

Reasonable excuse defence: the current position

Les Howard explains the vagaries and subtleties of the 'reasonable excuse' argument

The single Tax Tribunal regime means that 'reasonable excuse' arguments can be inter-changeable between different taxes. This is very helpful for advisers helping their clients decide whether to pursue an appeal on this issue.

The Upper Tier decision in Christine Perrin provides a useful update of the position and seeks to provide a framework for future FTT and Upper Tier decisions. Its methodical approach means it has become a key decision for the Tribunal. The First Tier decision is at [2014] UKFTT 488; the Upper Tier is at [2018] UKUT 0156. Unless otherwise referenced, paragraph references are to the Upper Tier decision.

Basic facts and ground of appeal

The Perrin saga began on 2 January 2011 when Mrs Perrin tried to submit her Tax Return for 2009/10 online. She received a submission receipt but not a confirmatory email. After correspondence, HMRC withdrew the penalty for £2 in relation to the 2009/10 Tax Return.

Mrs Perrin's 2010/11 Tax Return was also late, and her 2011/12 Tax Return was paid late. Penalties included fixed and daily penalties, summarised in the FTT decision, paras 1-8. The appeal against daily penalties was delayed pending the Donaldson Court of Appeal decision ([2016] EWCA, Civ, 761).

The FTT decision is itself pretty detailed, being one of the very first appeals in relation to the then new late filing and late payment penalty regime.

As an aside, the FTT criticised HMRC that their bundle was deficient. It used Mrs Perrin's own file of correspondence to supplement HMRC's deficient paperwork!

Mrs Perrin argued that, since she had an honestly held belief that the tax returns had been submitted, a reasonable excuse was established. This issue was addressed by the FTT and I will return to it.

HMRC included in their submission that a reasonable excuse is 'an unexpected or unusual event that is either unforeseeable or beyond a person's control.' This phrase is rarely seen now. It is wording found in the dissenting judgment in the Steptoe case, an early reasonable excuse decision ([1992] STC 757). It was disingenuous of HMRC to use that quote. (See paras 101-110 of the FTT decision, and para 83 of the Upper Tier decision.)

The reasonably held view defence – its history

The Upper Tier reverted to the VAT Tribunal case of The Clean Car Co ([1991] VATTR 234). This provided an objective test in relation to a reasonable excuse appeal: "In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his

obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself in at the relevant time, a reasonable thing to do? Put in another way which does not I think alter the sense of the question: was what the taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position the taxpayer found himself, to do?"

In *Coales* ([2012] UKFTT 477), the FTT commented that the word 'reasonable' imported an objective test, and that 'the taxpayer' recognised that the objective test applied to the particular taxpayer in receipt of a penalty or surcharge.

So, can a belief which is reasonably held constitute a reasonable excuse? This question was addressed by the FTT in *Chichester* ([2012] UKFTT 397) and *Gray Publishing Ltd* ([2014] UKFTT 113). Those cases referred back to a Court of Appeal decision in relation to an offence under the Identity Cards Act 2006 (*R v Umah* [2011] EWCA Crim 1837). The Upper Tier took a quite nuanced view of the CA decision. A reasonable, or genuine, belief could be 'an element in' the person contending that there was a reasonable excuse (para 60).

The CA indicated that it would expect the appellant to offer more evidence of other circumstances. Put another way, a reasonable belief is not generally sufficient to constitute a reasonable excuse by itself. That seems to have been the conclusion of the VAT Tribunal in *The Clean Car Co*; see para 52.

What an appeal to the Upper Tier is not

An appeal from the FTT to the Upper Tier is based on the Tribunals, Courts and Enforcement Act 2007. An appeal can only be made on a point of law. This point was made strongly by the Court of Appeal: "I cannot emphasise too strongly that the issue on an appeal from the Tribunal is not whether the appellate body agrees with its conclusions. It is this: as a matter of law, was the Tribunal entitled to reach its conclusions? It is a misconception of the very nature an appeal on a point of law to treat it, as too many appellants tend to do, as just another hearing of the self-same issue that was decided by the Tribunal." (*HMRC v Procter & Gamble* ([2009] EWCA Civ 407)). Although the Court suggested that taxpayers often fall into this error, I have observed that HMRC do the same!

The mistake is to think that, having lost at the First Tier, another Tribunal or Court will take a different view. It is not a matter of shouting louder in a Higher Court to get your own way!

Another element

This is an important principle, which advisers will do well to highlight with clients at an early stage.

Before the Tribunal or Court answers the reasonable excuse question, it has to be established whether the events which triggered the penalty have actually happened. This burden lies with HMRC.

So, for example, has the Tax Return been submitted after the due date? Was the VAT Return paid late? It is open to the taxpayer to challenge any statement made by HMRC, including

any Witness Statement provided by a HMRC Officer. Do not simply assume that HMRC's statements are correct.

If HMRC cannot establish this or the taxpayer successfully challenges it, the penalty will be cancelled. There will be no need to go on to the reasonable excuse question.

A template

The Upper Tier, in its final comments (para 81), produced a template for the FTT in future reasonable excuse appeals. Advisers should keep this template to hand, so that any approach to HMRC for review or appeal is soundly prepared.

(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).

(2) Second, decide which of those facts are proven.

(3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"

(4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times.

The template considers the relevant facts, and which can be proven. It is not enough for the taxpayer to state something; evidence will have to be provided. Do consider what evidence needs to be obtained, including witness evidence. The Upper Tier suggested this summary question for the FTT to ask; "was what the taxpayer did (or omitted to do, or believed) objectively reasonable for this taxpayer in those circumstances?"

When the taxpayer's failure to comply lasted any period of time, the FTT has to consider whether any reasonable excuse lasted throughout that period. And, when the reasonable excuse has ceased, the FTT has to determine whether the taxpayer remedied the failure without reasonable delay.

This is the link to the Upper Tier decision: <https://tinyurl.com/2mfkvpku>

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